IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943

No. 63

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

vs.

S. B. HEININGER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT.

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Opinions Below.

The opinion of the Board of Tax Appeals (R. 25-34) is reported in 47 B. T. A. 95. The opinion of the Circuit Court of Appeals (R. 46-49) is reported in 133 F. (2d) 567.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on February 15, 1943 (R. 50). The petition for a writ of certiorari was filed on May 14, 1943, and was granted on June 14, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Whether the respondent (taxpayer) whose sole business was the manufacture and sale of artificial dentures by mail, can deduct as ordinary and necessary business expenses under Section 23 (a) of the Revenue Acts of 1936 and 1938 the sums expended by him for attorneys' fees and legal expenses in resisting the issuance of a statutory "Fraud Order" by the Postmaster General; and in filing suit for and obtaining a permanent injunction against the execution of such "fraud order" which permanent injunction upon appeal was dissolved, but which expenditure made it possible for respondent (taxpayer) to continue in business and produce a substantial portion of the income which is the subject of the asserted deficiencies.

Statutes and Regulations Involved.

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 19-21.

Statement.

The statement of the case by petitioner omits the pertinent facts that during the years in question, 1937 and 1938, the respondent's *sole business* was the manufacture and sale of false teeth by mail (R. 19); respondent rendered no dentistry service in his office during 1937 and

1938, and did not have a dentist's chair there; he manufactured and shipped artificial dentures to customers who sent his orders from all States in the Union, other than Illinois (R. 20).

Summary of Argument.

The legal expenses paid by the respondent in 1937 and 1938 were "ordinary" and "necessary" business expenses and were therefore deductible from respondent's gross income for those years.

These legal expenses were "ordinary" because they constituted attorneys' fees and legal expense in connection with litigation which threatened the safety of respondent's business and which were, therefore, directly connected with, and proximately resulted from, respondent's business.

These legal expenses were "necessary" because the litigation in which the expense was incurred was proximately related to respondent's business and because these expenditures were the means of saving the life of respondent's business during the years in question, thereby making possible the production of a substantial amount of respondent's income which is the subject of the asserted deficiency.

The decision of the Circuit Court of Appeals herein is sound and correct irrespective of whether respondent's business was a lawful or an unlawful business. If the business was unlawful, it was unlawful in its entirety and had no separable phases, or activities. In either case, whether the business was lawful or unlawful, these legal expenses are deductible because the clearly expressed purpose of the income tax law is to tax *net income*, irrespective of source.

ARGUMENT.

The legal expenses paid by respondent in 1937 and 1938 were ordinary and necessary business expenses and were deductible from respondent's gross income for those years.

During the years in question (1937 and 1938) the sole business of the respondent was the manufacture and sale of false teeth by mail (R. 19). Respondent rendered no dentistry services in his office and did not have a dentist's chair there (R. 20); he was completely dependent upon the use of the mails in the operation of the business. The orders for artificial dentures came to respondent by mail. By the same means, he forwarded to his customers instructions and materials for the taking of impressions of the gums; the impressions were returned to him by mail (R. 19). The artificial dentures were manufactured in respondent's laboratory, from the impressions so taken, and when completed were forwarded to the customer by mail (R. 19). At every step the use of the mails was necessary to the existence of respondent's business.

In these circumstances, with the continued existence of respondent's business wholly dependent upon the use of the mails (R. 19, 20) respondent was served, on September 22, 1937, by the Post Office Department with a citation charging that respondent was conducting a scheme for obtaining money through the mails by means of false or fraudulent pretenses, representations or promises in violation of 39 U. S. C. A., Sections 259 and 732 (R. 17). Because respondent's business was wholly dependent upon

the use of the mails this action threatened the continued existence of the business. Accordingly, respondent retained legal counsel to appear at the Post Office Department hearing and defend against these charges (R. 17).

Thereafter, on February 19, 1938, the Postmaster General issued a "fraud order" instructing the Postmaster at Chicago, Illinois, to return to the senders, marked "Fraudulent," all mail addressed to the respondent and forbidding the payment of any money orders drawn to the order of respondent (R. 18).

It is fair to assume that had the respondent not employed counsel to defend against these charges in the Post Office Department, a "fraud order" would have been issued against him by default and the execution of such order would have terminated respondent's business soon after September 22, 1937. Moreover, had respondent not employed counsel to defend against these charges he would have had no sufficient record of the proceedings to exercise his lawful right to appeal to the Courts for relief against any wrongful or arbitrary action by the Postmaster General. It is indisputable that respondent's expenditures for attorneys' fees and legal expenses in the year 1937, alone, made possible the production of a substantial portion of the income of the business for that year.

The "fraud order" of February 19, 1938 completely extinguished respondent's business because his sole business was the manufacture and sale of artificial dentures by mail (R. 19). Deprived of the use of the mails, respondent had no means of receiving orders for his product; no means of sending impression material and instructions to his customers or of receiving the impressions from which he could manufacture the artificial dentures; and no

means to forward the completed product to the customer or of receiving payment therefor (R. 19).

On February 25, 1938 respondent, through his attorneys, filed a bill of complaint for injunction in the District Court of the United States for the District of Columbia to restrain the execution of the aforesaid "fraud order"; on the same date the District Court entered a restraining order directing the Postmaster General to hold all mail addressed to respondent until the further order of the Court (R. 18). Thereafter on June 6, 1938 the District Court entered a permanent injunction against the Postmaster General enjoining the execution of the aforesaid "fraud order" (R. 18). Respondent thereafter continued in business until about April 17, 1939 when the United States Court of Appeals for the District of Columbia reversed the decree of the District Court and remanded the cause with instructions to dissolve the injunction and dismiss the bill of complaint (R. 18).

It was solely as a result of the attorneys' fees and expenses incurred for the legal services above set forth that the respondent was allowed to continue in business and produce taxable income after the issuance of the "fraud order" on February 19, 1938.

In this state of the record in this case the petitioner asserts that the deduction of these attorneys' fees and legal expenses should be disallowed because such expenditures were not ordinary and necessary expenses for carrying on the business of the respondent. To sustain this position petitioner at page 5 of his brief says "certainly in the practice of dentistry it is neither common nor frequent to make false and fraudulent representations through the use of the mails." But the record shows that the *sole*

business of the respondent was the manufacture and sale of false teeth by mail (R. 19). The fact that respondent was a licensed dentist is of no relation to any issue in this case. Respondent rendered no dentistry service in his office and had no dentist's chair there (R. 20); his customers did not personally visit his office (R. 17). So far as his business was concerned respondent was a mechanic manufacturing an artificial device (dentures) for use as a substitute for natural teeth. The record is clear that respondent was not engaged in the practice of dentistry (R. 17, 19, 20).

Respondent's right to take the deductions in question arises under Section 23 (a) of the Revenue Acts of 1936 and 1938, as amended (Appendix pp. 19-20).

It is well established by the authorities that payments made by a taxpayer in resisting legal proceedings affecting the safety of his business, are deductible as expenses of carrying on the business.

The fact that the respondent was never before required to defend a proceeding in the Post Office Department, or to apply to the courts for injunctive relief against the action of the Postmaster General did not make his expenditures, in so doing, other than "ordinary" business expense.

In *Welch* v. *Helvering*, 290 U. S. 111, a taxpayer sought to deduct as business expense certain payments made by him on the debts of a corporation, of which he was a former officer. The payments were made after the corporation's discharge in bankruptcy, for the purpose of aiding his own business standing. In considering whether such payments were "ordinary" in the statutory sense, this Court said at page 114:

> "Ordinary in this context does not mean that the payments must be habitual or normal in the sense that the same taxpayer will have to make them often. A lawsuit affecting the safety of a business may happen once in a lifetime. The counsel fees may be so heavy that repetition is unlikely. None the less, the expense is an ordinary one because we know from experience that payments for such a purpose, whether the amount is large or small, are the common and accepted means of defense against attack."

The right of a taxpayer to deduct payments for attorneys' fees and legal expenses was upheld by this court in the case of *Kornhauser* v. *United States*, 276 U. S. 145. In that case the taxpayer had incured and paid attorneys' fees in the successful defense of an accounting suit instituted by his former co-partner. This Honorable Court held that the payment of attorneys' fees was an ordinary and necessary business expense and at page 152 said:

> "A suit ordinarily, and, as a general thing at least, necessarily requires the employment of counsel and the payment of his charges."

and at page 153:

> "* * Where a suit or action against a taxpayer is directly connected with, or, * * * proximately resulted from, his business, the expense incurred is a business expense within the meaning * * * of the act."[3]

In the case of *Foss* v. *Commissioner*, 75 Fed. (2d) 326, Foss, being the owner of stock in American Blower Company and the Sturtevant Company, was sued by the minority stockholders of the Blower Company and charged with diverting the business of that company to the Sturtevant Company and also with violating the Sherman Act. The District Court sustained the charges and granted re-

(3) The provisions of the act referred to are identical with those of Sec. 23(a) (1) under consideration.

lief. The Circuit Court of Appeals modified the relief granted, but otherwise sustained the District Court. Foss incurred attorneys' fees in this litigation, which he sought to deduct from his income as ordinary and necessary expenses of his business. This deduction was disallowed by the Board of Tax Appeals, but on appeal to the Circuit Court of Appeals, the deduction was allowed and the Court at page 328 said:

> "We entertain no doubt that the counsel fees in question were an ordinary and necessary expense of that business. The test is stated in *Kornhauser* v. *United States*, 276 U. S. 145, 153, 48 S. Ct. 219, 220, 72 L. Ed. 505, in which it was said, 'Where a suit or action against a taxpayer is directly connected with, or, as otherwise stated, * * * proximately, resulted from, his business, the expense incurred is a business expense,' etc. Sutherland, J. The litigation was plainly an outgrowth of the business activities in which Foss was engaged. He was brought into the suit, not as the Government contends, simply because of his stock ownership in the Blower Company, but because of his stock ownership and business activity in the Sturtevant Company and the Blower Company. *It was his business activities in those connections which exposed him to the suit. Under such circumstances counsel fees are a deductible expense, as was expressly held in the Kornhauser case.* See, too, *Commissioner* v. *Continental Screen*, 58 F. (2d) 625 (C. C. A. 6); *Commissioner* v. *People's Pittsburgh Trust Co.* (C. C. A.) 60 F. (2d) 187." (Italics supplied.)

Because the clear purpose of the Revenue Act is to reach only the net portion of a taxpayer's income, those sections of the statute relating to deductions should be, and have been, construed as broadly as those defining gross income. In *Alexandria Gravel Co.* v. *Commissioner*, 95 Fed. (2d) 615, 616, the Circuit Court of Appeals said (p. 616):

"The revenue laws of the United States are not over-squeamish. By the broad definition of gross income, income arising from an illegal business is taxed even though the illegality be one declared by the Constitution itself. *United States* v. *Sullivan*, 274 U. S. 259. *The provisions of the Statute fixing the deductions to be regarded in arriving at the net income which alone is taxed*, 26 U. S. C. A. Sec. 23, *are as broad and unqualified as those defining the taxable gross income. Ordinary and necessary expenses of an illegal business would therefore seem to be deductible if they would have been had the business not been prohibited.*" (Italics supplied.)

In *United States* v. *Sullivan*, 274 U. S. 259-263, the obligation of a taxpayer to pay a tax on the net income from an occupation prohibited by the 18th Amendment to the Constitution, was sustained and this court said, page 263:

"We see no reason to doubt the interpretation of the act, or any reason why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay."

There is nothing in the Revenue Act which suggests that expenses of an unlawful business are to be treated any differently than expenses of a lawful business. The sole objective of the income tax laws is to tax net income, irrespective of source.

That the legal expenses here sought to be deducted were ordinary and necessary expense to the "carrying on" of respondent's business is succinctly stated in the opinion below by Mr. Justice Minton, where it is said:

"Without this expense, there would have been no business. Without the business, there would have been no income. Without the income, there would have

been no tax. To say that this expense is not ordinary and necessary is to say that that which gives life is not ordinary and necessary." (R. 49).

The "Fraud Order" entered by the Postmaster General does not amount to an adjudication that respondent's business was unlawful.

The Postmaster General is empowered by Section 3929 Revised Statutes (39 U. S. C. Sec. 259) to act pursuant to this statute "upon evidence satisfactory to him." (Appendix p. 19). The Courts have consistently held that any appeal from the action of the Postmaster General under this statute is limited to the sole question of whether there is *any* substantial evidence to sustain the Postmaster General; and that unless the action of the Postmaster General is "palpably wrong and therefore arbitrary" the courts are powerless to intervene. *Leach* v. *Carlisle*, 258 U. S. 138-140; *Farley* v. *Heininger*, 105 Fed. (2d) 79-81. The Postmaster General conducts hearings under this statute as an administrative officer and is not required to apply the rules of evidence as in a Court. *Farley* v. *Simmons*, 99 Fed. (2d) 343-346.

The order of the Postmaster General operates only for the limited purpose of withdrawing the statutory franchise to the use of the Postal facilities. For these reasons we submit that the order of the Postmaster General does not rise to the dignity of the adjudication of a Court; that it cannot be given any collateral effect here, as an adjudication that respondent's business was unlawful. To give such effect to the order of the Postmaster General and to disallow respondent's deductions for that reason would be to deprive the respondent of property without due process of law.

We respectfully submit that the petitioner is not authorized to judge for himself the lawfulness of a taxpayer's conduct. This is a function of the Courts. No Court has ever determined respondent's business to be unlawful. If petitioner be permitted so to sit in judgment then deductions become a matter of grace at his hands.

Resume of Authorities Cited by Petitioner.

We respectfully submit that the authorities put forward by the petitioner do not meet the question here presented. In the main they deal with legal situations involving lawful businesses engaging in unlawful activities and where either upon pleas of *nolo contendre*, guilty or by *consent* decree there has been an adjudication of unlawful activities, as an adjunct, to a lawful business. Whereas, in the instant case, the activities which brought the respondent's business before the Postmaster General were no mere adjunct of respondent's business, they were the business *itself*. Wherefore, we submit that respondent's expenditures for attorney's fees and legal expenses, which expenditures were the direct means of the production of most of the income against which the deficiency is asserted, were ordinary and necessary expense of carrying on the business, and therefore deductible. This is true whether respondent's business be viewed as a lawful, or an unlawful, business.

In the instant case the elements of admission of guilt or consent, as by decree, are wholly absent. Here the respondent, at every stage, resisted the issuance and execution of the "fraud order" and in so doing exercised every remedy available to him in the law.

In *Textile Mills Corporation* v. *Commissioner*, 314 U. S. 326, relied upon by petitioner, this Court held that under

Section 23 (a) as construed by Article 262 of Treasury Regulation 74, the taxpayer was not entitled to deduct from income the expenses of lobbying and disseminating propaganda, paid by the taxpayer to bring about enactment of legislation authorizing recovery of German properties seized during World War I. Article 262 of Treasuary Regulation 74, provided in part as follows:

> "Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income."

The Court held that the Regulation was a proper exercise of the rule-making authority of the Treasury Department, and, accordingly, disallowed as a deduction the expenditures for lobbying and propaganda. It is clear that the Court so decided because the deduction was expressly prohibited by the Regulation. In the instant case there is no Article of the Treasury Regulations construing Section 23 (a) as prohibiting deduction of attorney's fees and legal expenses paid under circumstances such as are here present. This fact alone distinguishes the *Textile Mills Corp.* case. The instant case does not involve expenses for lobbying or propaganda. Manifestly, it can not reasonably be said to be against public policy for a taxpayer to employ attorneys to exercise legal remedies made available to him by the law of the land.

The case of *Standard Oil Co.* v. *Commissioner*, 129 Fed. (2d) 363, does not support petitioner. In that case the payment of a tort judgment entered against the taxpayer in favor of the Government, was held not deductible because the Court concluded after a careful study of the record, *that the said judgment was an adjudication that*

the taxpayer had been guilty of corrupting public officials and of perpetrating fraud upon the Government. (See p. 371 of report.) Certainly it cannot be seriously argued that expense incurred by the employment of attorneys in exercising legal remedies provided by law as in the instant case, is to be placed in the same category as the payment of a judgment based upon a fraud against the Government and the corruption of public officials by the taxpayer.

In *National Outdoor Advertising Bureau* v. *Helvering*, 89 F. (2d) 878, cited by petitioner, the taxpayer incurred legal expenses in defending against charges of violation of the Sherman Act. As to a part of the charges, the taxpayer defended successfully. As to the balance, it agreed to a consent decree. The taxpayer sought to deduct attorney's fees paid in this litigation. The Circuit Court of Appeals approved a deduction of the attorney's fees paid in defending the charges upon which the consent decree was silent, but denied the deduction of legal expenses paid in negotiating the settlement and drafting of the consent decree. It is worthy of note that this decree was entered with the *consent* of the defendant. The consent was a clear recognition by the defendant that the practices complained of would be unlawful in the future and that such practices had been unlawful in the past. The decree was an *adjudication* by the Court of defendant's unlawful conduct in connection with a lawful business. The instant case does not involve the elements of *adjudication* and *consent;* likewise it does not involve a business having separable activities.

Notwithstanding these distinguishing elements in the instant case we submit that the *National Outdoor Advertising* case is manifestly unsound in its conclusion. This is clearly apparent when the doctrine of that case is ap-

plied to an illegal and prohibited business. In an unlawful business, the illegal conduct is basic and pervades all that is done. No basis exists for finding a lack of proximate relation between the business expenses, on the one hand, and the conduct of the unlawful business, on the other hand. In such a case, it cannot logically be asserted that the unlawful conduct is unnecessary. If the case of *National Outdoor Advertising Bureau* v. *Helvering* properly construes Section 23 (a) then logically it must follow that no expense whatever of conducting an unlawful business is deductible, and the tax must fall upon the gross receipts of such a business. Manifestly, that is not the law. The tax is imposed upon the net income of the taxpayer, not gross receipts. By the Revenue Acts of 1936 and 1938 Congress taxed only net income remaining after deduction of all ordinary and necessary expenses of carrying on the business.

Another group of cases cited by respondent involved attempts by taxpayers to deduct payments which had been exacted by the law as punishment for unlawful conduct. *Chicago, R. I. & P. Ry. Co.* v. *Commissioner*, 47 Fed. (2d) 990, penalties imposed for violation of the Federal Safety Appliance laws and other statutes; *Burroughs Bldg. Material Co.* v. *Commissioner*, 47 Fed. (2d) 178 (C. C. A. 2d), concerned fines; *Great Northern Ry. Co.* v. *Commissioner*, 40 Fed. (2d) 373 (C. C. A. 8th), and *Tunnel R. R.* v. *Commissioner*, 61 Fed. (2d) 166 (C. C. A. 8th) concern penalties for violation of Federal statutes and regulations relating to the operation of railroads; *United States* v. *Jaffray*, 97 Fed. (2d) 488, involved negligence penalties imposed under the income tax laws.

We believe that in the cases mentioned above the Courts correctly disallowed deductions of the fines and penalties,—payments which had been required by the law to

punish and deter unlawful conduct. The result would be anomalous indeed if, after such punishment, the law were to grant to a taxpayer a substantial tax benefit by permitting him to deduct such fine or penalty from his income. However, the present case does not involve any question of deducting expenditures for fines or penalties. It concerns amounts paid by petitioner for attorneys' fees and legal expenses in exercising remedies provided by the law. Accordingly, there exists no comparable reason, resting on considerations of public policy, for refusing petitioner the right to deduct his said expenditures.

For the most part, the remainder of the cases cited by respondent involved attempts to deduct payments, the act of making which involved conduct either unlawful or offensive to public morale. *Maddas* v. *Commissioner*, 40 B. T. A. 572, affirmed, 114 Fed. (2d) 548 (C. C. A. 3), concerned bribes paid to prohibition agents; *Silberman* v. *Commissioner*, 44 B. T. A. 600, concerned payments for maintaining an illegal betting booth prohibited by state law; *Kelley-Dempsey & Co.* v. *Commissioner*, 31 B. T. A. 351, involved graft payments; *Easton Tractor & Equipment Co.* v. *Commissioner*, 35 B. T. A. 189, and *New Orleans Tractor Co.* v. *Commissioner*, 35 B. T. A. 218, involved payments by contractors to gain personal influence with State highway departments; *Nicholson* v. *Commissioner*, 38 B. T. A. 190, concerned a payment made to influence a State Senator; *Rugel* v. *Commissioner*, 127 Fed. (2d) 393, involved a sum paid to gain wrongful political influence.

In the cases mentioned above, the deductions were correctly disallowed for reasons of public policy. Certainly, one who seeks to corrupt public officials or improperly to gain political influence or to escape the consequences of

dishonest performance of public contracts, should not be granted a tax benefit because of such a payment. Such expenditures are not ordinary and necessary business expenses. However, the present case does not involve deduction of any amount paid as a bribe, or as a graft, or to gain political influence. This case involves the sole question whether respondent is entitled to deduct the amounts which he expended for attorneys' fees and legal expenses in exercising his legal remedies. Obviously, the cases referred to above afford no support for petitioner's position.

The petitioner contends that because the permanent injunction granted respondent in the District Court, was ultimately dissolved by the United States Court of Appeals, that therefore the legal expense incurred by respondent was incurred in an unsuccessful action. True, the action ultimately failed but for a considerable time and to a great extent it was successful—successful to the extent that it was the direct means of producing a substantial portion of respondent's income in the year 1937 and all of his income in the year 1938. In this respect the instant case presents a completely different factual situation than appears in any of the authorities cited by petitioner.

CONCLUSION.

Whether respondent's business be viewed as a lawful or an unlawful business, in either case it was either lawful or unlawful in its entirety; it had no separable phases or activities. In either case, under the statutes, the regulations issued thereunder and the authorities construing the same, the tax is upon *net* income, and these deductions should be allowed. It is clear from the facts in this case that the attorneys' fees and legal expense incurred by respondent were "ordinary" and "necessary" to the "carrying on" of respondent's business and that the income produced by the business was the direct result of those expenditures. We respectfully submit that the decision here of the Circuit Court of Appeals for the Seventh Circuit is in all respects sound and correct and should be sustained.

Respectfully submitted,

FLOYD LANHAM,
Attorney for Respondent.

APPENDIX.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * * * *

Section 23 (a) of the Revenue Act of 1938, c. 289, 52 Stat. 477, is identical with Section 23 (a) of the Revenue Act of 1936, *supra*.

Revised Statutes:

SEC. 3929, as amended.—The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at

any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such mail matter so returned to the writers thereof, under such regulations as the Postmaster General may prescribe. Nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by mail to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself." (U. S. C., title 39, Sec. 259.)

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART. 23 (a)—1. *Business expenses.*—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, * * *. Among the items included in business expenses are management expenses, commissions, labor, supplies, incidental repairs, operating expenses of automobiles used in the trade or business, traveling expenses while away from home solely in the pursuit of a trade or business (see article 23 (a)—2), advertising and other selling expenses, together with

insurance premiums against fire, storm, theft, accident, or other similar losses in the case of a business, and rental for the use of business property. Penalty payments with respect to Federal taxes, whether on account of negligence, delinquency, or fraud, are not deductible from gross income. The full amount of the allowable deduction for ordinary and necessary expenses in carrying on a business is nevertheless deductible, even though such expenses exceed the gross income derived during the taxable year from such business. As to items not deductible under any provision of section 23, see section 24.

Article 23 (a)—1 of Treasury Regulations 101, promulgated under the Revenue Act of 1938, is identical with Article 23 (a)—1 of Treasury Regulations 94, *supra*.